Supreme Court, U.S.
FILED
JUN 14 2000
CLERK

(6)

No. 99-1647

IN THE
Supreme Court of the United States

AMERICAN TARGET ADVERTISING, INC.,
Petitioner

v.

FRANCINE A. GIANI, DIRECTOR,
UTAH DIVISION OF CONSUMER PROTECTION,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

DAVID A. STRAUSS
1111 East 60th Street
Chicago, IL 60637
(773) 702-9601

MARK J. FITZGIBBONS *
AMERICAN TARGET ADVERTISING, INC.
9625 Surveyor Court, Suite 400
Manassas, Virginia 20110
(703) 392-7676
* *Counsel of Record*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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Two features of the Brief in Opposition are especially noteworthy. First, respondent does not take issue with our demonstration that the question presented in the petition is a recurrent issue of great national importance. Indeed, respondent's conditional cross petition explicitly asserts that the issues raised by this case are important enough to warrant this Court's review. See 99-1829 Pet. 8. Second, in the Brief in Opposition, as in the courts below, respondent has failed to identify a single reason why Utah is justified in going beyond the reasonable regulation of organizations that solicit contributions in the state to impose registration and disclosure requirements on organizations like ATA, which do not engage in solicitation—or, for that matter any other activity—in Utah.

Instead of explaining why Utah has an interest in regulating fundraising consultants like ATA, respondent tries to change the subject by suggesting that ATA is more than a fundraising

consultant. Respondent also attempts to defend the court of appeals' plainly wrong decision to use intermediate scrutiny in reviewing the regulations at issue in this case. And respondent asserts, erroneously, that ATA failed to raise below issues that it did in fact raise.

1. Respondent, apparently aware that she cannot provide any justification for regulating fundraising consultants like ATA, repeatedly tries to suggest that ATA is not just a consultant but is itself somehow involved in seeking charitable contributions on behalf of Judicial Watch. See, *e.g.*, Br. in Op. 4-6, 9-10, 22. This is simply a diversionary tactic. The Utah Act itself places "fund raising counsel or consultant[s]" in a wholly separate category from, for example, "[p]rofessional fund raiser[s]" and "[p]aid solicitor[s]" (see Utah Stat. Ann. §§ 13-22-2 (9), (10), (11)), who provide services that may include door-to-door collection of contributions. Respondent has never suggested that ATA is required to register as anything other than a "fund raising counsel or consultant," and this suit challenges the registration and disclosure requirements imposed on fundraising counsel and consultants.[1] Respondent's effort to portray ATA as a fundraiser in Utah is an attempt to blur the categories that Utah's own statute establishes, and it reveals respondent's awareness of what we have always maintained: that the regulation of the "fundraising counsel" category, at least, simply cannot be justified.

2. Rather than providing an explanation of why Utah is justified in imposing burdensome registration and disclosure requirements on organizations like ATA, respondent makes vague and sweeping statements about the need to prevent fraud. See, *e.g.*, Br. in Op. 14, 20, 26-27. The record is, in

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[1] Needless to say, the principles for which we contend will have broader application, but in this litigation ATA has not challenged the other provisions of the Utah Act.

fact, completely devoid of any facts supporting a requirement that out-of-state consultants like ATA obtain a license before providing out-of-state services to nonprofit organizations.[2] Faced with the utter absence of record evidence, respondent, like the courts below, relies on dicta from this Court's opinions that refer to the regulation of door-to-door solicitation. See, *e.g*, Br. in Op. 16, citing *Riley v. National Federation of the Blind*, 487 U.S. 781, 792 (1988). But the regulation of door-to-door solicitation is completely different from the regulation of organizations like ATA, who are not engaged in any form of solicitation. Respondent's ritual invocation of the general interest in preventing "fraud" is not enough to defend this specific regulatory regime, which requires both a license and extensive disclosures and—most significantly—is directed at organizations like ATA that themselves have no contact with Utah citizens.[3]

At no point in this litigation has respondent provided any explanation of why the need to prevent fraud against Utah citizens justifies it in requiring non-soliciting consultants like ATA to obtain a license and to disclose such highly invasive matters as their officers' home addresses and their plans and strategies for fundraising. See Utah Stat. Ann. §§ 13-22-9(1)(b)(v), 13-22-9(1)(b)(vii)(A)(B). At no point has respon-

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[2] Respondent must make an even greater showing than this. Regulatory requirements like Utah's would effectively prevent nonprofit organizations who have received some advice from a professional consultant from sending out any mail unless every consultant who has advised them is registered in every state to which they wish to send mail. There are, of course, no facts in the record that remotely support the imposition of such a burden on nonprofit organizations.

[3] Notably, respondent failed to offer any statistical or other evidence of the fraud she claims is the reason for Utah's licensing scheme (C.A. App. 541), despite being asked specifically for such support by the district court (*id.* at 525).

"C.A. App." refers to the appendix filed in the court of appeals. In the petition we mistakenly referred to this document as "Dist. Ct. App."

dent explained why Utah's interests cannot be fully accommodated by reasonable regulation of the organizations that themselves solicit contributions (or by other less restrictive means, some of which ATA itself suggested in the courts below. See C.A. App. 126, 508.). And as we showed in the petition, the fact that there is no justification for the Utah Act makes it unconstitutional not just under the First Amendment—which requires not just a justification but a compelling justification—but under the Commerce Clause and the Due Process Clause as well. See Pet. 15-16, 17-19, 20.

3. Respondent also defends the court of appeals' erroneous ruling that regulations like those imposed on ATA are subject only to intermediate scrutiny. See Br. in Op. 12-20. Respondent's approach, like the court of appeals' decision, would severely damage the principle this Court has carefully established—that strict scrutiny applies to laws, like the Utah Act, that are neither content neutral nor merely limits on the time, place, and manner of speech.

Respondent first denies that the Act is a content-based regulation—even though the Act, by its terms, refers to the content of both ATA's speech and its clients' speech. The Act seeks to regulate ATA because ATA "plans, manages, advises, counsels, consults, or prepares material for, or with respect to, the solicitation in this state of contributions for a charitable organization" (Utah Stat. Ann. § 13-22-2 (11)(a)(1)). If ATA were to "advise[]" or "counsel[] * * * with respect to" any other subject, it would not be covered by the Act. Respondent argues (Br. in Op. 13-14) that the Act is not content-based because it does not discriminate against particular points of view, but this argument misunderstands the law: the Court has repeatedly held that strict scrutiny applies to content-based regulations of speech even if they are neutral among viewpoints. See, *e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345, 347 (1995) ("[E]ven though this provision applies evenhandedly to advocates of

differing viewpoints, it is a direct regulation of the content of speech"); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 117 (1991).

Respondent, revealingly, relies (Br. in Op. 14, 15) on two cases—*Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and *Turner Broadcasting Systems v. FCC*, 512 U.S. 622 (1994)—both of which deal with content-neutral measures that, as the Court explicitly noted, regulate only the time, place, or manner of speech. See *Ward*, 491 U.S. at 789; *Turner Broadcasting*, 512 U.S. at 637. The Utah Act is precisely *not* a time, place, or manner regulation. It forbids any direct mailings containing solicitations by clients who receive advice from consultants who have not registered. Respondent fails to identify any case in which this Court has applied anything less than strict scrutiny to a measure like the Utah Act.

Similarly, the notion that the Act regulates only "secondary effects" (see Br. in Op. 14) is wrong. Respondent's repeated assertion is that the Act is needed to prevent Utah citizens from being defrauded. See, *e.g.*, Br. in Op. 14, 17-20. But concerns about fraud "'focus[] only on the content of speech and the direct impact that speech has on its listeners.' " *United States v. Playboy Entertainment Group*, 120 S. Ct. 1878, —— (2000) (2000 WL 646196, *6), quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988) (opinion of O'Connor, J.). "This is the essence of content-based regulation." *Playboy Entertainment Group*, 120 S. Ct. at —— (2000 WL 646196, *6).

The real basis of respondent's position is revealed by her statement that "regulation is not triggered by the mere exercise of First Amendment freedoms, but by the solicitation of contributions from Utah residents." Br. in Op. 21. As this Court has repeatedly held, the solicitation of contributions *is* an exercise of First Amendment freedom. See, *e.g.*, *Riley*, 487 U.S. at 787-88; *Secretary of State v. Joseph H. Munson Company, Inc.*, 467 U.S. 947, 959-60 (1984); *Village of Schaum-*

burg v. Citizens for a Better Environment, 444 U.S. 620, 632-33 (1980). Respondent ignores what this Court has specifically described as "the reality that without solicitation the flow of * * * information and advocacy [by nonprofit organizations] would likely cease." *Riley*, 487 U.S. at 796 (internal quotation marks and citation omitted).

Indeed, as we argued in the petition (Pet. 8)—and respondent ignores—the speech restricted by the Utah Act involves multiple First Amendment rights. The letters that are restrained by the Utah Act often contain petitions to the government. See, *e.g.*, C.A. App. 227, 229-54. Direct mail is often the only practical means by which out-of-state nonprofit organizations may circulate petitions to citizens of Utah; indeed it is the only means by which small organizations may circulate petitions nationally. In addition, as this Court has recognized, "[t]he First Amendment freedom of association is squarely implicated" by a measure that, like the Utah Act, restricts the ability of organizations to aggregate the contributions of large numbers of individuals. See *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 494 (1985).

4. Unable to answer the arguments we advance in the petition, respondent repeatedly asserts that we failed to make those arguments below. In every respect, respondent is mistaken. Respondent asserts (Br. in Op. 12 n.5) that in the courts below we asserted only the First Amendment rights of ATA's clients and did not argue that ATA's own First Amendment rights were at issue; but in our briefs in the courts below, we argued that the Act violated both ATA's and its clients' First Amendment rights. See, *e.g.*, ATA C.A. Br. 10 (describing the Utah Act as a "double prior restraint" because it restricts the rights of both ATA and its clients); *id.* at 31.

Similarly, respondent asserts (Br. in Op. 18) that we have not previously challenged the Act's distinction between paid and unpaid consultants, a distinction that, as we showed in the

petition, is flatly inconsistent with *Meyer v. Grant*, 486 U.S. 414 (1986). But we made that precise argument, specifically citing *Meyer v. Grant*, in our brief in the court of appeals. ATA C.A. Br. 24.[4] Respondent's further argument that *Meyer v. Grant* does not control here because the Utah Act only restricts ATA's speech, rather than banning it outright, is concisely answered by this Court's recent opinion in *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. at —— (2000 WL 646196, *6):

> It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.

Finally, respondent asserts (Br. in Op. 21) that we did not raise below the failure of the Utah Act to provide the procedural safeguards that are required when there is a prior restraint of speech, including a deadline for the administrative decision. Again respondent is mistaken. See ATA C. A. Br. 10, 16-17, 18.

5. In a similar vein, the Brief in Opposition attempts to make much of the way in which ATA is compensated by its clients (see, *e.g.*, Br. in Op. 8-10). Respondent never explains why this has any relevance to the constitutional issues before

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[4] The relevant passage from ATA's opening brief in the court of appeals is as follows; it leaves us at a loss to understand how respondent can say this argument was not raised below (ATA C.A. Br. 31):

> Fundraising counsel who are not paid do not need to register and obtain a license under the Act even though they would be assisting with the distribution of the very same petitions and letters. The protection of the First Amendment is in no way lost or diminished simply because American Target is paid for its services in the process of petition distribution. *See, Meyer v. Grant* [citation omitted]. The Act is in direct contravention of the holding in *Meyer v. Grant.*

the Court. Indeed, under *Meyer v. Grant*, *supra*, the fact that the Utah Act applies only to paid consultants, and not to those who are unpaid, is, as we showed in the petition, one of the things that makes it unconstitutional. See Pet. 12. For purposes of the principle of *Meyer v. Grant*, it is, of course, wholly immaterial how ATA is paid.

In any event, respondent's statements are, again, inaccurate. Respondent asserts that "[p]ayment for [ATA's] services is directly tied to contributions." Br. in Op. 5. But ATA's contract with Judicial Watch specifies that ATA is compensated for each letter sent, whether or not the recipient makes a contribution. See C.A. App. 19. In fact, in addition to being irrelevant, what respondent's discussion of ATA's compensation actually shows is that the state—which asserts that registration and disclosure requirements are needed to provide information to citizens about charitable solicitations—in fact cannot be trusted to provide a fair portrayal of what nonprofit organizations pay to their consultants.

For these reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID A. STRAUSS
1111 East 60th Street
Chicago, IL 60637
(773) 702-9601

MARK J. FITZGIBBONS *
AMERICAN TARGET ADVERTISING, INC.
9625 Surveyor Court, Suite 400
Manassas, Virginia 20110
(703) 392-7676

* *Counsel of Record*

June 14, 2000